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36283—23——1

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

FEDERAL TRADE COMMISSION, PETITIONER, *v.* SINCLAIR REFINING COMPANY, RESPONDENT.	No. 213.
FEDERAL TRADE COMMISSION, PETITIONER, *v.* STANDARD OIL COMPANY (NEW JERSEY), respondent.	No. 637.
FEDERAL TRADE COMMISSION, PETITIONER, *v.* GULF REFINING COMPANY, RESPONDENT.	No. 638.
FEDERAL TRADE COMMISSION, PETITIONER, *v.* MALONEY OIL & MANUFACTURING COMPANY, respondent.	No. 639.

REPLY BRIEF FOR PETITIONER.

The present brief is by way of reply to the briefs of the Sinclair Refining Company, the Gulf Refining Company, and the Maloney Oil & Manufacturing Company, the brief of the Standard Oil Company (New Jersey) not having been received on account of the sickness of counsel. We would respectfully

request the privilege of filing a brief in reply to the forthcoming brief of last-named company should we desire to do so.

REPLY TO BRIEF OF SINCLAIR REFINING COMPANY.

We are in serious conflict with opposing counsel in regard to the bearing upon this respondent of important evidence on behalf of the Commission.

Opposing counsel make an effort to neutralize large portions of the testimony in the western group of cases, among which the case against the Sinclair Refining Company was one. (Brief, pp. 14 to 33.) For such purpose they distinguish between evidence on behalf of the Commission, which specifically refers to the Sinclair Company, and evidence which relates to a practice which counsel asserts is not indulged in by his client corporation, and evidence on behalf of the Commission which has general application to the practice charged against the company.

These distinctions are not justified by the record and are exceedingly misleading. The evidence adverse to the practice is evidence against this respondent irrespective of specific reference to that corporation. Six cases were tried simultaneously relating to the practice as indulged in by concerns in Mississippi Valley States west of Ohio, among which was the case against this respondent. Therein testimony relating to the general nature and the effect of the practice was heard as regards that entire group of cases simultaneously, although the cases were not consolidated as to the interstate character

of the trade each corporation conducted, the extent to which they had engaged in the practice, and similar matters which had been previously covered by stipulations.

Objection to the method thus pursued, if it had ever been appropriate, is certainly no longer proper, inasmuch as the testimony was taken upon the basis stated without objection on the part of counsel. (Sinclair, Rec. p. 77.) Counsel for this respondent was under misapprehension as to the scope of the hearing but did not object to the plan of procedure nor ask for the recall of witnesses examined in his absence. (Record, Id.) He can not equitably object now.

The fact that only occasional reference to the Sinclair Refining Company appears is a negligible consideration, since that company, by stipulation, has admitted that it engaged in the practice and the extent of the employment thereof. (Stipulation, Sinclair, Rec. p. 136.) Evidence, therefore, of the effect of the practice upon competition is distinctly binding upon this respondent.

Turning now to the second distinction, in order to show its misleading character we shall be obliged to refer in brief fashion to the testimony of the Sinclair witnesses from whom opposing counsel quote.

The witness Smith clearly had in mind contracts with lessees which restricted the lessee to the use of the product of the leasing corporation in the equipment leased, and not to contracts which would ex-

pressly prohibit the use of the product of another company in other equipment. The language quoted by opposing counsel (Brief, pp. 22, 23) is expressly corrected in his testimony that the contracts to which he refers provide that "no gasoline but ours shall be handled through this equipment" (Sinclair, Rec. 50). The lessee "can install a pump belonging to some one else." (Sinclair, Rec. p. 51.) The reason for his making the confused statement quoted by opposing counsel was simply that the witness did not distinguish between a restriction absolute upon its face and a restriction which permitted the installation of other equipment not owned by the leasing corporation, and the use of another's product therein. He testified that "none at all" of his customers had "more than one outfit on the premises." (Sinclair, Rec. p. 51.)

The witness Zust was also talking about the only practice which he knew anything about, namely, that where the lessee is prohibited from "permitting anybody else to put their oil through that pump and tank." (Sinclair, Rec. p. 61.)

Witness Wormhoudt was clearly testifying about the form of contract in which the lessee is enjoined "that he shall sell only your (the lessor's) gasoline through that pump." (Sinclair, Rec. p. 61.) This witness, also in the testimony quoted by opposing counsel was referring to the only situation he knew about. He said, "I have never seen a garage that had over one equipment." (Sinclair, Rec. p. 61.) If a retailer has but one equipment, each type of

restriction effects a complete restriction of the filling station.

The loose reference made by witness Mac Ewen, as quoted by opposing counsel, is explainable upon precisely the same ground. He testified that "in the ordinary course of business among the ordinary garage people and retailers of gasoline, the universal practice is to have just one pump outfit." (Sinclair, Rec. p. 74.) Hence, the absolute restriction and the restriction limited to the equipment leased are absolutely identical under the circumstances this witness had in mind.

The witness Cordell is in the same category. The pumps which he leased were on condition "that the gasoline stored in the equipment and sold through it was to be our gasoline." (Sinclair, Rec. p. 87.)

Once more opposing counsel have, in the case of witness Williams, recited evidence in a misleading manner. Williams's company had used two types of contracts, one of which contained a prohibition, absolute in its terms against the use by the lessee of any gasoline whatever other than lessor's. This form, however, had been abandoned and was not introduced into the record, and Williams's testimony clearly related to the effect of the nominally less drastic of the two forms of restrictive covenant, the same as that of respondent. The instruments then in mind were specifically those in which the lessees "were to use only our gasoline (i. e. of witness's company) in the pump during the life of the agreement." (Sinclair, Rec. pp. 115, 117.)

While there is a certain plausibility in the quota
tions made from the record by opposing counsel i
this relation, the whole situation is clear when it i
borne in mind that the almost universal custom
among the retailers of gasoline is but one equipmen
at each station other than service stations owne
by a producing corporation. The distinction sough
to be made is not a genuine one.

Few additional comments need be made upon th
answering brief in the Sinclair case. We would say
that counsel have gone widely afield from the record
in many of their contentions. Their complaint se
up the necessity of the leasing practice in order t
secure safety in the handling of gasoline, protection
to the quality and trade-marks of the corporation
convenience, and service to the public.

Counsel briefed these points as though they had
proven them, but the Sinclair record is silent thereon
Their defense, therefore, has failed in such relation
and their brief should have been oblivious of such
defenses. We refer to the discussion of the supposed
advantages in our brief (pp. 52 to 65).

We concur in the views of opposing counsel that
the practice might be "bad merchandising" and yet
might not constitute an unfair method of competi-
tion. That it is "bad merchandising" is, however,
assuredly evidence that the practice is not necessary
to secure the supposed advantages counsel dwells
upon without having supported.

Every witness of record in the Sinclair case but
one is opposed to the practice, and most of them have

been elaborately so quoted in counsel's brief (pp. 38 to 47).

On the other hand, counsel are in error in assuming that the Commission did not make a case as regards the lessening of competition.

There is evidence that the leasing practice with restrictive covenant "tends to concentrate business among a chosen few" and "to eliminate competition." (Sinclair, Rec. p. 74.) Also it "tends to reduce the number of competitors to only the strongest companies in the field" (Id. p. 83), and when you have leased an equipment with restriction "you do not have to spend time and money seeing that fellow to hold his business, losing it, and getting it back again. You have got it." (Id. p. 93.) For the period of the lease the practice limits competition (Id. p. 131); and it has the same effect as to lubricating oils "absolutely," having "cut down competition in the lubricating business" (Id. p. 57). It "certainly" cuts down competition between gasoline marketing companies. (Id. p. 61.)

So far as the Sinclair record is concerned this evidence is absolutely uncontradicted.

Opposing counsel's position is grounded in the theory that the public is sufficiently protected against the lessening of competition provided the wholesaler leaves the retailer the naked legal right to install additional equipment for handling the gasoline of other companies, and the privilege of acquiring the equipment leased. The retailer, however, has no

interest in installing other equipment beyond the needs of his trade, nor in paying out good money to buy equipment which is already gratuitously loaned to him. His business does not demand that he adopt either course, nor will he go to inconvenience and expense in order to see that the public is served by several gasoline marketers.

The position of the defense would entrust the preservation of competition between marketing companies to the foresightedness and statesmanship of retailers in gasoline and their willingness to put themselves out for the public good. Whereas, it is our contention that Congress does not intend to leave the matter to such hazard.

Questions of law, we believe, have been sufficiently covered in our opening brief.

REPLY TO BRIEF OF GULF REFINING COMPANY.

Counsel for this respondent likewise rely upon the legal right of the lessee to ward off the lessening of competition by buying additional equipment and using therein competing gasoline, "if he has the business to justify their installation and the money with which to pay for them." (Gulf brief, p. 17.) But the record shows that the lessees do not have the business to justify it, and counsel admit that most instances support the justice of the Commission's finding that lessees require and have but one equipment each. (Gulf brief, p. 15.) The fact is that it would be a business mistake for the retailer to put in other, or to purchase it unnecessarily.

On the contrary the leasing retailer is taken out of the competitive field and the competition for his business is destroyed. (See our opening brief, p. 16.) When any territory has as many retailers as can find remunerative trade and these are restricted by this practice, competition can not but be lessened—the opportunity to establish a delivery route is gone.

To insist that competition has increased because additional retail dealers have been established is to confuse increased volume of business with increased competition. The volume of business and the number of distributing stations may be doubled in an industry where there is a complete monopoly.

If it were admitted that the practice has resulted in the establishment of new outlets, still the question whether the practice creates or increases competition would remain to be determined from the circumstances of the particular case. (See our brief in chief, pp. 44–47.)

Counsel would have the court believe that Congress is interested in gross volume of trade, instead of in the forestalling of methods which make for the lessening of competition for trade, whatever be its volume.

There is tremendous competition to tie up individual retailers, and this has been mightily increased by the means afforded by the practice of securing exclusive privileges over individual dealers. But this competition tends to lessen competition between marketers, since every dealer who has but one equip-

ment is no longer a genuine potential factor in the competition between marketing companies.

It may be added that counsel in their brief, page 9, have omitted completely the second branch of the definition of unfair methods of competition laid down by this Court in the case of *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, namely, methods which have "dangerous tendency unduly to hinder competition or create monopoly." This grand division of unfair methods is introduced by the important word "or." They likewise ignore the law as similarly laid down in *Federal Trade Commission* v. *Beech-Nut Packing Company*, 42 Sup. Ct. Rep. 150. (See our brief in chief, pp. 51, 52.)

REPLY TO BRIEF OF MALONEY OIL & MANUFACTURING COMPANY.

Counsel for this respondent relies strongly on four opinions in as many Circuits of the United States Circuit Court of Appeals rendered in cases brought for the review of orders of the Commission relative to the practice in controversy. These were all adverse to the Commission.

The decision in *Standard Oil Company of New York* v. *Federal Trade Commission*, 273 Fed. 478, in our judgment contains certain clear errors.

The Court was wrong, we submit, in believing that the question of lessening of competition, of lawfulness, may turn upon that of "convenience to the public," "the ease with which motor drivers may obtain 'gas,'" protection to trade-marks. (Id. p. 480.)

If the practice tends to lessen competition it is unlawful by Act of Congress.

The Court erred also in that it held that the practice had the advantages just named (Id. p. 482) and also protected the brands of lessor company (Id. p. 480). The record clearly shows that many of the largest and smallest companies alike do not approve it, that it does not prevail in many sections wherein the automobile driving custom prevails to the highest degree. These supposed advantages are clearly spurious. The real motive underlying the practice is that of exclusive appropriation of each dealer to whom equipment is leased. (See our brief, pp. 52 to 64.)

The Court's position necessarily implies a holding that the advantages are attributable to the leasing with the restrictive covenant. This is error. The advantages are inherent in the equipment and not in the restriction. The equipments are used for the distribution of gasoline refined by companies which do not use the covenant as well as by those which do, and in sections where the practice does not prevail as well as where it does.

The Second Circuit also confounds competition to secure exclusive hold upon the retailers with genuine and lasting competition (Id. p. 482), but after the retailer has signed the lease he will use no other gasoline in the equipment and he has no use for another equipment. Competition between gasoline marketers is dead, so far as he is concerned and for the territory he can best supply.

Nor is the freedom of the retailer an "unfair and dishonest" thing as the Court supposes. (Id. p. 481.) The record shows without contradiction that where the retailer owns the pump he is honest about it and when he wishes to change to another marketing company he simply removes the sign or illuminated globe of the old supply company and puts up that of the new—a moment's undertaking. (Standard Rec. Vol. II, pp. 516, 517, 500, 493; Vol. III, pp. 33, 34.)

The Sixth Circuit in *Canfield Oil Company* v. *Federal Trade Commission* and five other cases (274 Fed. 581), concurred in the views of the Second Circuit, but deemed itself lacking in jurisdiction in that it held that interstate commerce was not involved.

Counsel for the Maloney Oil & Manufacturing Company clearly misapply this decision. The lease of pumping equipment is a local matter for local distribution, but it is part of a great interstate movement of gasoline. The leasing contracts necessitate importation from beyond State lines, and are, therefore, in interstate commerce. (See our opening brief, pp. 69–72.)

Hence the other respondents here have not raised the jurisdictional point. The stipulations in the Ohio group of cases which were before the Sixth Circuit are absent in the instant cases, and, quite to the contrary, as regards this respondent, there is an admission of importance in this relation. In its answer this company admits that it purchases its gasoline in various States and that the same is trans-

ported in interstate commerce and sold to various purchasers and that in its business of "selling such products the same are constantly moved from one State to another by the respondent, and there is conducted by respondent a constant current of trade in such products." (Maloney, Rec. Vol. I, p. —.)

This admission brings the respondent under the cases cited.

That the Seventh Circuit was in error in the cases of *Sinclair Refining Company* v. *Federal Trade Commission*, 276 Fed. 686, in holding that the Federal Trade Commission Act conferred jurisdiction "only where there are practices that amount to a fraud in regard to some public or private right" * * *, in effect, has recently been held by this court.

The Commission has power, irrespective of fraud, as held in *Federal Trade Commission* v. *Beech-nut Packing Company*, 42 Sup. Ct. Rep. 150, in the class of cases here in controversy. (See our opening brief, p. 52.)

Nor does the Commission arrogate to itself "the right to fix prices." The vice the Commission is striking at is the restrictive covenant. The gratuitous character of the loan is merely the means whereby the marketing corporations are enabled to secure the restrictive covenant. They are the inducement which enables the wrong to be perpetrated. It may be added in passing that the Commission departed from such findings as caused the Seventh Circuit to deem the point in issue to be that of a price fixing effort, and in its subsequent findings and

other cases here before the Court do not contain findings of the character criticised.

As regards the opinion in the cases of *Standard Oil Company* v. *Federal Trade Commission*, *The Gulf Refining Company* v. *Same*, and *Maloney Oil & Manufacturing Company* v. *Same*, 282 Fed. 81, our specification of errors on pages 22 and 23 has been fully made.

The Court is fundamentally wrong in its conception of "the tying element in the transaction." They deem it to be "one arising from human nature and business sense, namely, that the retailer will install no other outfit so long as he is satisfied with the quality and price of the wholesaler's gasoline, and so long as one outfit serves his trade."

It is clear that while the contract nominally leaves the lessee "perfectly free to deal in all petroleum products made by competing wholesalers" and while nominally he is "at liberty to install by lease or purchase as many other outfits as he may choose and to sell through them as many brands of gasoline as he may desire" (Id. p. 89), he has been placed by the restrictive covenant in a position where both parties know that the lessee will not install other equipment nor buy the equipment leased.

It is clear that most retailers do not have sufficient business to justify another equipment and it is folly for him to make investment in equipment which he can secure free. The record shows that when a retailer has leased a pump rival marketers do not solicit him for business and that station is closed for

all practical purposes to competition between gasoline companies.

The view of the minority of the court is clearly sound:

> The leases are now in force. The fact that they may be terminated at some future time is not relevant to the issue now under consideration, * * * thereby free competition among the wholesalers of gasoline has been and now is restricted, not with respect to an insignificant number of retailers, but with respect to a large majority thereof, and as effectually as if the leases were in perpetuity and as if they expressly prohibited the lessee from using or dealing in the gasoline of competitors of the respective lessors. (282 Fed. p. 89.)

We again respectfully submit that the judgments of the Courts below should be reversed and the Commission sustained in its orders.

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